United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

73-1667

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Docket No. 73-1667

WILLIAM F. BUCKLEY, JR., NATIONAL REVIEW &
M. STANTON EVANS,

Plaintiffs-Appellees,

v.

AMERICAN FEDERATION OF TELEVISION AND RADIO
ARTISTS,

Defendant-Appellant.

PETITION FOR REHEARING OR FOR CLARIFICATION OF THE OPINION

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In review of what is conceived by plaintiffs to be the importance of the questions of constitutional and labor relations law raised by this case, and the interrelationship between them, plaintiffs respectfully request a rehearing *en banc.*

Facts

Because of the request for the rehearing *en banc*, we refer briefly to the facts.

As stated by the Court at page 3075, "with great care the district court accurately set forth the specific facts and circumstances from which this litigation arose. See 354 F.Supp. 826-836." 11a-31a. The Court stated a condensed version at pages 3075-3077.

In a word, the plaintiffs, commentators on public affairs on TV and radio, were prevented from speaking on the air by the defendant union and employer-broadcasting companies. The union entered into uniform agreements known

as the "Code of Fair Practice" by which commentators such as plaintiffs were required to be union "members in good standing" as a "condition of employment"—in this instance this requirement served to prevent speech unless plaintiffs joined the union. The union acted under the authority of § 8(a) (3) of the National Labor Relations Act. Plaintiffs negotiated their own employment contracts, the union thus not in fact functioning as "exclusive bargaining agent." Plaintiffs therefore challenged their obligation to pay dues. Plaintiffs brought this action for a declaratory judgment that they could not be compelled to join the union or pay dues as a condition of speaking on the air. Other facts appear in the opinions and in the present petition.

POINT I

The opinion of the Court has, plaintiffs submit, overlooked the difference between First Amendment standards and those applicable to the Fourteenth.

In this case the opinion of the Court has upheld a prior restraint on speech to enforce the collection of dues under the authority of § 8(a) (3) of the National Labor Relations Act, although liability for the dues was challenged in good faith by plaintiffs.

The thrust of the Court's opinion is expressed in the long paragraph beginning "Acts of speech" at the top of page 3082 of which the more decisive passages are as follows:

> "Acts of speech and of expression, although protected by the first amendment, are not so exalted that they can never be, even indirectly, obstructed. Cox v. New Hampshire, 312 U.S. 569 (1941). . . . More specifically, where there is a proper governmental purpose for imposing a restraint and where the

> restraint is imposed so as not to 'unwarrantedly abridge' acts normally comprehended within the first amendment, there is no abridgment of first amendment rights. Cox v. New Hampshire, supra at 574. Nor is there any abridgement of first amendment rights arising from the congressional authorization granting a union the power to collect dues from employees in a 'union shop'."

We would not of course deny the right of the union to bring an action at law to collect the dues—what plaintiffs do object to is the collection of dues by prior restraint of speech, especially when on the merits they challenge their obligation to pay dues.

We submit that the Court has imposed a Fourteenth Amendment test rather than a First Amendment test. The Supreme Court held in *Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217 (1967), that an Illinois statute infringed the First Amendment despite the fact that it was a legislative effort to deal with a recognized problem, saying at page 222:

> "We have therefore repeatedly held that laws which affect the exercise of these vital rights (under the First Amendment) cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."

Similarly in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), the Court, in finding the flag salute requirement of the West Virginia Board of Education in violation of the First Amendment, said in part at pages 638-639:

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved . . . The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a rational basis for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

The Court's view of the First Amendment, easygoing it seems to us, cannot, we believe, be reconciled with the stringent requirements of the Supreme Court as expressed in such cases as *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); and *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

Cox v. *New Hampshire*, 312 U.S. 569 (1941), and *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), are not to the contrary. In *Cox* v. *New Hampshire* the Court upheld a state statute forbidding a " 'parade or processions' upon a public street" without a license. Fees were charged for the license depending upon the length of the parade or procession. Pages 576-577. The Court noted that the appellants "were not prosecuted for distributing leaflets, or for conveying information by placards or otherwise . . ." Page 573. In other words, there was no prior restraint of speech; there was only regulation of the use of public property.

In *Branzburg* v. *Hayes* the Court sustained a subpoena served on a newspaper reporter, noting on page 681:

> ". . .(T)his case involves no intrusion upon speech or assembly, no prior restraint or restriction on what the press may publish . . ."

With great respect, we believe that in this case the Court has not been what it described itself as being in *Baker* v. *F & F Investment Co.*, 470 F.2d 778, 783 (1972), viz., "mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms."

POINT II

The Court overlooked, we believe, that it is implicit in the National Labor Relations Act that unions' right to collect dues as a condition of employment under § 8(a)(3) is dependent upon functioning in fact as exclusive bargaining agent in accordance with § 9(a).

The Court correctly stated (page 3083):

> "Appellees also contend that they did not seek, and do not desire, to be represented by the union . . ."

What plaintiffs emphasized on this phase of the case was, however, not that they did not seek or desire to be represented by the union, but that they were not in fact represented by the union in their bargaining, but did their own bargaining with their respective employers. The Court refers to the plaintiffs' separate bargaining at page 3076, as does the District Court at 23a. Buckley said without contradiction that "Aftra performs no collective bargaining functions with respect to his employment contracts. . . ." JA168a. Evans described his own separate negotiations leading to a personal employment contract. JA369a. Both the Buckley and Evans contracts with their

employer-broadcasting companies explicitly state that the contracts constitute the entire agreements of the parties (SA13b; JA380a).

Plaintiffs maintained that the union not having in fact functioned as their bargaining representative, and they having negotiated their own employment contracts, the union was an impostor when it claimed dues under § 8(a)(3).

§ 9(a) of the Act provides that the union "shall be the exclusive representative of all the employees in such (collective bargaining) unit for the purposes of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment . . ."

§ 8(a)(3) does not expressly provide that a union forfeit its extraordinary rights to collect dues (e.g. making payment a "condition of employment"); nevertheless it does define what a union is to do to earn its right to dues—indeed § 9(a) defines the only consideration the union provides. It may be urged that the union does bargain on behalf of plaintiffs—but it obviously is not an "exclusive representative".* If the union's non-exclusive bargaining does in fact produce some benefit to plaintiffs—denied by them—the union could sue in *quantum meruit*, but whether it does nor not, the union has not, we submit, complied with its duties under the statutory scheme, yet it seeks to avail itself of the peculiar and special collection privileges granted unions by the Act.

In the Supreme Court cases in which, on the "free rider" theory, § 8(a)(3) and the corresponding provision of the

*The TV Code of Fair Practice expressly contemplates that individual employees may negotiate "terms over and above the minimum", JA313a; the Radio Code only purports to be a "Schedule of Minimum Fees" (SA1b).

Railway Labor Act were upheld, the "rates of pay, wages, hours of employment and other conditions of employment" of the employees involved were in fact governed by collective bargaining agreements negotiated exclusively by the unions. *Railway Employees' Department* v. *Hanson*, 351 U.S. 225, 331 (1956); *Machinists* v. *Street*, 367 U.S. 740, 761-762 (1961); *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734, 740-741 (1963). So far as our research has disclosed no union has ever been held entitled to § 8(a)(3) collection rights without having in fact functioned as "exclusive representative".

Benefit. The Court said (page 3083) that:

> "(A)lthough he (the District Judge) found that the appellees derived some benefit from their memberships in union pension plans, he regarded this as not being substantial enough to make the appellees 'free riders'. We disagree with the district court. There is no rational basis for distinguishing between the degrees of benefit one enjoys as a result of a union's bargaining efforts on his behalf."

What the District Judge said was (56a):

> "There is no evidence raising the factual issue contemplated by the 'free rider' cases, that is whether these plaintiffs are in fact 'free riders', or whether they do in fact enjoy any Aftra benefits. Apparently, these plaintiffs, by reason of union membership, are enrolled in defendant's pension plan. That is all. They each bargained for their own compensation, which is in excess of the union 'scale' or minimum, and do not appear to have benefited in any other manner".

In the District Court the union, in its statement of the undisputed facts upon which summary judgment might be

granted, made no mention at all of benefit or pension plan.* Nor did the union in its answering affidavits on plaintiffs' motion for summary judgment and supporting affidavits on its own cross-motion for summary judgment (JA220a-251a) make any reference to the pension plan or plaintiffs' enrollment in it.

In this Court the union conceded, and the Court held, that plaintiffs could not be required to be members, or at least "full-fledged members." Footnote 5, page 3085.

Presumably in view of this concession the union did not argue in this Court that plaintiffs derived any benefit from their enrollment in the pension plan. The pension plan is not mentioned in the union's brief. The union, although printing a most voluminous appendix, did not include the provisions of the Codes relating to the pension plan. § 102 of the TV Code; §87 of the Radio Code. The excerpts from the Codes printed in the appendix by the union are designated "Relevant Provisions" JA292a-323a;386a-393a. Thus the union regarded the pension plan as irrelevant to its appeal.

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* These facts were said to be (quoting from the union's brief in the District Court, pages 54-55):

"(1) Plaintiffs joined AFTRA.

"(2) Plaintiffs have paid their dues to AFTRA at all times.

"(3) Plaintiffs are employed on radio and television programs.

"(4) Plaintiffs speak their minds as commentators on public affairs and public persons.

"(5) Their employer(s) and AFTRA require them to pay dues as a condition of continued employment.

"(6) Plaintiffs want to be freed from the obligation to pay dues to AFTRA as a condition of continued employment in radio and television."

Further, the union's brief in the District Court made at pages 5-17 "a counter-statement of the facts." There was no reference to the pension plan or other alleged benefit in this counter-statement. Plaintiffs' reply brief in the District Court stressed these deficiencies (pages 28-30).

Under these circumstances plaintiffs did not refer to the pension plan in their brief or in the supplemental appendix.

In this state of the record the enrollment in the pension plan does not, we submit, warrant this Court's disagreement with the District Court or provide a persuasive rationale for the denial of what would, or might, otherwise be plaintiffs' constitutional rights. We would urge that the Court, as did the union, treat the enrollment in the pension plan as failing to provide "demonstrable benefit." More persuasive, we believe, are the cases referred to in Point I, and the admitted failure of the union to function as "exclusive representative."

POINT III

The Court has, we submit, in finding the District Court's jurisdiction pre-empted by that of the National Labor Relations Board, overlooked *Vaca* v. *Sipes*, 386 U.S. 171 (1967), holding that the jurisdiction of the courts is not pre-empted in cases involving alleged breach of duty of fair representation, *Retail Clerks* v. *Schemerhorn*, 373 U.S. 746 (1963), holding that pre-emption does not apply to matters of settled law, and *Freedman* v. *Maryland*, 380 U.S. 51 (1965), holding that, when First Amendment values are at stake, an administrative tribunal that does not act with the greatest expedition is to be disregarded.

The result reached as to compulsory membership is, we submit, anomalous. Counsel for the union admitted, indeed, proclaimed, in the most categorical terms that under the law it could not require plaintiffs to be members and characterized as "misrepresentations" assertions made to plaintiffs by union representatives and employer-broadcasting companies that they must join. This Court agreed. Footnote 5, pages 3085-3086; cf. also text, page 3086.

Yet the Court, on basis of the pre-emption doctrine, reversed a judgment declaring what the union conceded. As the concurring opinion observes, the complaint directed its thrust at the claim previously made by the union, and made in the District Court by the union's predecessor counsel, that it could compel membership, a claim over which, insofar as attacked on constitutional grounds, the District Court did have jurisdiction, as the concurring opinion implies. Hence the assertion made by the union's counsel in this Court, that the union could not compel membership, had the odd result of *ex post facto* depriving the District Court of jurisdiction to say so.

Plaintiffs submit that this application of the doctrine of pre-emption overlooks both *Vaca* v. *Sipes*, 386 U.S. 171 (1967), *Retail Clerks* v. *Schemerhorn*, 373 U.S. 746 (1963), and *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

In *Vaca* v. *Sipes* the Court held that the doctrine of pre-emption did not apply to claims of breach of the union's duty of fair representation (of members of the collective bargaining unit), whether or not the alleged breach was arguably an unfair labor practice. The Court noted that pre-emption did not apply unless it could "fairly be inferred that Congress intended exclusive jurisdiction to lie with the National Labor Relations Board" (page 179). Citing a number of cases in which the courts had adjudicated claims of breach of duty of fair representation, the Court concluded that jurisdiction of such claims had not been pre-empted (page 177). The reasoning by which the Court reached this conclusion emphasized the wrongs which an individual might suffer by reason of "arbitrary" union conduct, and the inadequacies of the Board's procedures in such situations. Pages 182-183.

As illustrations of breaches of the duty of fair representation the Court referred not only to arbitrary conduct or other action lacking in "complete good faith and honesty", but also to "invidious treatment . . . in matters affecting their (members') employment."

We submit that the union's conduct in this case falls within these pejorative classifications.

As far back as 1947 the Supreme Court in *Radio Officers Union* v. *National Labor Relations Board*, 347 U.S. 17, held that §§ 8(a) (3) and 8(b) (2) (pages 40-41)

> ". . . were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood . . . Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees."

This doctrine has been recognized in a long series of cases both in the Supreme Court and in the Courts of Appeals. Such cases were cited in the briefs of both parties.* Nevertheless in the face of this doctrine, the union insisted that both plaintiffs become members of the union, in the full sense of the word, as the Court noted at page 3084. The District Court described these events more fully at 24a-31a. And the union continues to include in its Codes of Fair Practice agreements with employer-broadcasting companies a provision under the terms of which the latter agree to

*Some are cited *infra* page 13.

> "employ and maintain in our employment only such persons covered by this agreement who are . . . members in good standing."

The union's brief in this Court aptly said (page 12):

> "As indicated by Buckley's and Evans' experiences, AFTRA expects producers to make clear to performers the obligation of union membership as embodied in collective bargaining agreements. This is generally done, but should it fail to be done, AFTRA would make appropriate representations to the producer in question."

There has been no suggestion that this practice has been discontinued, and indeed according to our information it has not been. Within the last few days one of Buckley's close associates, Mr. William A. Rusher, was, against his will, required to join the defendant union by National Broadcasting Corporation as a condition of employment to discuss political affairs. The explanation given as to the requirement was the duty of the employer to the union under the Code of Fair Practice.

We respectfully submit that for the union to continue to insist, either directly or through the employer-broadcasting companies, that employees must join as a condition of going on the air, while fully cognizant that it has no right to, and indeed so arguing as a means of escaping the jurisdiction of the courts, is a breach of its duty of fair representation, that it is "dishonest conduct."

In *Motorcoach Employees* v. *Lockridge*, 403 U.S. 274 (1971), upon which the Court relies, the Supreme Court was careful to find that the issue was not fair representation, but the interpretation of a contract. At that four

justices dissented, reasoning that the doctrine of pre-emption applied only to disputes between labor and management as in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), a case also relied on by the Court.

Application of the pre-emption doctrine is indeed unnecessary here because the question is settled law. Under such circumstances there is no necessity or purpose in requiring the expertise of the Board, and the doctrine of pre-emption, whether or not otherwise applicable, will not be applied. *Retail Clerks* v. *Schemerhorn*, 373 U.S. 746 (1963). It is no longer arguable that the union may compel employees to become members. We have referred to *Radio Officers Union*, decided in 1947; other leading cases are *National Labor Relations Board* v. *General Motors Corp.*, 373 U.S. 734 (1963); *Union Starch & Refining Co.* v. *National Labor Relations Board*, 186 F.2d 1008 (C.A. 7th, 1951); *National Labor Relations Board* v. *Local 3*, 216 F.2d 285 (C.A.2d, 1954). Indeed, it is no longer arguable nor is it in fact argued; both parties, the *amici curiae* and the Court agree that the union cannot compel membership. When "what was an arguable question has been settled . . . we see no reason to hold our hand." 373 U.S. 756. It is only "when there is significant doubt about the matter . . . (that) it is initially a task for the Board." 373 U.S. 755.

Further, First Amendment values are at stake here. Plaintiffs were kept off the air until they succumbed to what the Court itself has characterized as "coercion". Footnote 5, pages 3085-3086. The District Court found that "uncontested facts . . . show an actual chilling of plaintiffs' freedom of expression." 42a. Under such circumstances plaintiffs should not be relegated to a slow and idiosyncratic administrative procedure. Cf. Justice Douglas's dissenting opinion in *Lockridge*, 403 U.S. 302-309; *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Zwickler* v.

Koota, 389 U.S. 241 (1967); *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (C.A.2d., 1969); *G.I. Distributors* v. *Murphy*, 469 F.2d 752 (C.A.2d, 1973).

The Court's suggestion in footnote 6, page 3086, that plaintiffs would be able to enjoin an employer-broadcasting company from discharging them from employment by reason of resignation from the union is, we would agree, legally correct, but the unfortunate fact is that no employer-broadcasting company will engage commentators on public affairs when engagement means a lawsuit and trouble with the union. This Court in *National Labor Relations Board* v. *Sucrest Corporation*, 409 F.2d 765, 771 (1969), took note of the pressures on employers to avoid the displeasure of unions. In the TV and radio industry performers are ordinarily engaged only for single occasions or for a short series. Plaintiffs' employment contracts on the Firing Line and Spectrum programs were never for longer than a year. Performers who come to be known as troublemakers would simply not be employed, assuming the doubtful proposition that a proceeding before the Board under 5 U.S.C. § 554(e) (declaratory order section of the Administrative Procedure Act) could be completed within a year. We submit that the pre-emption doctrine is carried to an unwarranted extreme when, under the circumstances of this case, judicial relief is denied in favor of so precarious a remedy.

POINT IV

If a rehearing is not granted, plaintiffs ask that the opinion be clarified.

The final action taken by the Court is described as "reversed and remanded." As read by us the opinion finally disposes of the case and there would be nothing for

the District Court to do but dismiss the complaint. If we are mistaken in this we would ask that the Court state what further issues remain for the District Court. If not, we would ask that the Court add, after the word "remanded", the following, "with instructions to dismiss the complaint", or words to that effect. The finality of the decision is perhaps necessary to a petition for certiorari.

May 28, 1974

Respectfully submitted,

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THE COURT: All right. Proceed. I would like

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